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UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL ADJUSTMENT ADMINISTRATION
WASHINGTON, D. C.

IN THE MATTER OF : BEFORE THE SECRETARY OF AGRICULTURE
:
E. M. DWYER : CASE NO. 38 - 1 - 31

FINDINGS OF FACT AND ORDER OF THE SECRETARY

On October 30, 1933, a marketing agreement for milk -- Greater Boston Market, was entered into and executed by and between certain contracting producers and certain contracting distributors, each group of which respectively marketed and distributed more than 70% of the fluid milk in the Greater Boston Market, and the Secretary; which agreement was effective on and after 12:01 a.m. Eastern Standard time, November 3, 1933. In said agreement the contracting distributors applied for and consented to licensing by the Secretary, subject to regulations prescribed by the Secretary and approved by the President and subject to terms and conditions not inconsistent with the purposes and effect of said agreement.

On October 30, 1933, the Secretary duly issued License No. 15, License for Milk--Greater Boston Market, effective November 3, 1933, and continuously since said date E. M. Dwyer has purchased fluid milk from producers in the New England Milk Shed and has distributed such milk for consumption in the Greater Boston Market, as defined in Exhibit B of said license and was a licensee duly licensed under License No. 15.

On March 15, 1934, the Secretary terminated License No. 15, License for Milk--Greater Boston Market, effective on and after 12:01 a.m. Eastern Standard time, March 16, 1934. In said order of termination it was provided that any and all obligations which have arisen or which may thereafter arise in connection therewith, by virtue of or pursuant to such license shall be deemed not to be affected, waived or terminated thereby.

On March 15, 1934, the Secretary duly issued License No. 38, License for Milk--Greater Boston Market, effective March 16, 1934, and continuously since said date E. M. Dwyer has been a distributor, engaging in the business of distributing, marketing or handling milk or cream for ultimate consumption in the Greater Boston Market, and is a licensee duly licensed under License No. 38.

On April 30, 1934, the Secretary issued an amendment to License No. 38, License for Milk--Greater Boston Market, effective May 1, 1934, with respect to the payments to be made by distributors for milk purchased from producers. The provisions of License No. 38, License for Milk--Greater Boston Market, however, except as amended by said amendment, were to continue to be in full force and effect.

On May 9, 1934, a written order of the Secretary, as provided for in General Regulations, Series 3, Sections 200 and 201, requiring E. M. Dwyer, hereinafter referred to as respondent, to show cause on or before the 21st day of May, 1934, why his license under said License No. 38 should not be revoked or suspended by the Secretary, was duly served upon the respondent.

Said Order to Show Cause contained the following statements of the alleged violations of the terms and conditions of the aforesaid licenses by the respondent:

"(1) That the said licensee at divers times since November 3, 1933, has violated the terms and conditions of License No. 15, License for Milk, Greater Boston Market.

"(2) That the said licensee at divers times since March 16, 1934, has violated the terms and conditions of License No. 38, License for Milk, Greater Boston Market.

"(3) That the said licensee has continuously since December 15, 1933, violated the terms and conditions of License No. 15, License for Milk Greater Boston Market, in that, although engaged in the handling in the current of interstate commerce of fluid milk in said market, he has distributed or marketed or handled fluid milk in said area in violation of Article III, Paragraph 2, of said license and also Exhibit D of said license.

"(4) That the said licensee has continuously since December 29, 1933, violated the terms and conditions of License No. 15, License for Milk, Greater Boston Market, in that, although engaged in the handling in the current of interstate commerce of fluid milk in the Greater Boston Market, he has failed and refused, and is now failing and refusing, to pay to the Director the amount of \$229.61, as shown in the Director's equalization accounts for the period, November 3, 1933, to November 30, 1933, which sum was due and payable on and after December 29, 1933, and is now overdue and unpaid, in violation of the terms of Article III, Par. 2 and Par. 5 (a), Section D of Exhibit D of said license.

"(5) That the said licensee has continuously since January 6, 1934, violated the terms and conditions of License No. 15, License for Milk - Greater Boston Market, in that, although engaged in the handling in the current of interstate commerce of fluid milk in the Greater Boston Market, he has failed and refused, and is now failing and refusing, to pay to the Director the amount of \$147.19, as shown in the Director's equalization accounts for the period, December 1, 1933, to December 15, 1933, which sum was due and payable on and after January 6, 1934, and is now overdue and unpaid, in violation of the terms of Article III, Par. 2 and Par. 5 (a) Section D of Exhibit D of said license.

"(6) That the said licensee has continuously since December 29, 1933, violated the terms and conditions of License No. 15, License for Milk, Greater Boston Market, in that, although engaged in the handling in the current of interstate commerce of fluid milk in said market, he has failed and refused, and is now failing and refusing, to pay to the Director the amount of \$45.09, shown in the Director's accounts for the period November 3, 1933, to November 30, 1933 which sum was due and payable on and after December 29, 1933 and is now overdue and unpaid, in violation of the terms of Article III, Par. 6 of said license.

"(7) That the said licensee has continuously since January 6, 1934, violated the terms and conditions of License No. 15, License for Milk, Greater Boston Market, in that, although engaged in the handling in the current of interstate commerce of fluid milk in said market, he has failed and refused, and is now failing and refusing to pay to the Director the amount of \$24.43, shown in the Director's accounts for the period December 1, 1933 to December 15, 1933 which sum was due and payable on and after January 6, 1934, and is now overdue and unpaid, in violation of the terms of Article III, Par. 6 of said license.

"(8) That the said licensee has continuously since March 16, 1934, distributed or marketed or handled in the current of interstate commerce for ultimate consumption in the Greater Boston Market fluid milk which, since the effective date of said License No. 38, was purchased by the said licensee from producers in violation of Paragraph 3, Article II of said license, in that the said producers from whom such milk was purchased did not authorize, and have not authorized, the said licensee, with respect to payment for milk purchased from them, to comply with the provisions of Exhibit A of said license.

"(9) That the said licensee has continuously since March 16, 1934, violated the terms and conditions of License No. 38 in that, although engaged, since the effective date of said license, in distributing or marketing or handling in the current of interstate commerce for ultimate consumption in the Greater Boston Market of fluid milk, the said licensee has failed and refused, and is now failing and refusing, to fulfill his obligations as set forth in charges numbered (1), (3), (4), (5), (6), and (7) of this order, which obligations have arisen by virtue of, or pursuant to License No. 15, License for Milk, Greater Boston Market, issued by the Secretary on the 30th day of October, 1933, effective November 3, 1933, as provided by Paragraph 8 of Article II of said license.

"(10) That the said licensee has violated the terms and conditions of License No. 38 in that, although engaged

since the effective date of said license in distributing or marketing or handling in the current of interstate commerce, for ultimate consumption in the Greater Boston Market, fluid milk, the said licensee has failed and refused, and is now failing and refusing, to furnish to the Director complete and correct statements, on and in accordance with forms on file in the Director's office, of his receipts of milk and sales thereof as Class 1 and Class 2, respectively, and of all deductions from payments to producers in respect to milk purchased by him during the periods, December 16-31, 1933, January 1-15, and January 16-31, 1934, February 1-15 and 16-28, 1934, and March 1-15, 1934, as provided for by Par. 9 of Article II of said license.

"(11) That the said licensee has violated the terms and conditions of said License No. 38, in that, although engaged since the effective date of said license in distributing or marketing or handling in the current of interstate commerce, for ultimate consumption in the Greater Boston Market, fluid milk, purchased since the effective date of said license, he has failed and refused, and is now failing and refusing, to submit to the Market Administrator, in the manner prescribed by the Market Administrator, the reports as provided for by Par. 3 of Section A of Exhibit A of said license.

"(12) That the said licensee has violated the terms and conditions of said License No. 38, in that, although engaged since the effective date of said license in distributing or marketing or handling in the current of interstate commerce for ultimate consumption in the Greater Boston Market, fluid milk, purchased by said licensee from, and delivered to the said licensee by, producers since the effective date of said license, he has failed and refused to pay such producers for such milk in accordance with the terms and conditions of Par. 1 of Article II of said license and Par. 5 of Section A of Exhibit A of said license.

"(13) That the said licensee has violated the terms and conditions of said License No. 38, in that, although engaged since the effective date of said license in distributing or marketing or handling in the current of interstate commerce for ultimate consumption in the Greater Boston Market, fluid milk, purchased since the effective date of said license by said licensee from, and delivered to said licensee by, producers, he has failed and refused, and is now failing and refusing, to make the deductions from the payments made by said licensee to the said producers with regard to such milk, as provided for by Par. 1 of Article II and Pars. 1 (a), 1(b) and Par. 2 of Section D of Exhibit A of said license, and has failed and refused, and is now failing and refusing, to pay to the Market Administrator the said sums required to be deducted as aforesaid, which sums are overdue and unpaid.

"(14) That the said liconsee has violated the terms and conditions of said License No. 38, in that, although engaged since the effective date of said license in distributing or marketing or handling in the current of interstate commerce, for ultimate consumption in the Greater Boston Market, fluid milk, he failed and refused within twenty days of the effective date of said license, and is now failing and refusing, to submit to the Market Administrator written reports verified under oath, as provided for by Par. 5 of Exhibit B of said license."

An answer was filed to said Order to Show Cause on May 17, 1934, in accordance with General Regulations, Series 3. In said answer Charles S. Walkup, Jr., counsel for the respondent, 53 State Street, Boston, Massachusetts, denies the allegations in the Order to Show Cause in the following words:

"1. The defendant denies that he is or has been during the terms of the licenses in question engaged in the handling in the current of interstate commerce of fluid milk in the Greater Boston Market.

"2. The defendant denies that the license referred to in this order to show cause as License #15 is valid and constitutional or enforceable in its terms.

"3. The defendant denies that License #38 referred to in this order to show cause is valid and constitutional or enforceable in its terms.

"4. The defendant denies that he has willfully or intentionally violated any of the terms of either of said licenses but if he has in fact violated the terms of said licenses, it has been done because

"A. License #15 was never enforced in the Greater Boston Area.

"B. It is your defendant's belief, as set forth above, that neither of said licenses is valid, constitutional or enforceable against your defendant.

"5. And the defendant further says that he is filing this answer without consenting to the procedure laid down by the Secretary of Agriculture or without waiving any rights that the present procedure is improper, illegal and depriving the defendant of rights and property without a hearing before a proper tribunal."

On May 23, 1934, the Acting Secretary, not having found the answer of said respondent to be sufficient, by notice and order appointed the 29th day of May, 1934 at the hour of 10 o'clock a.m. as the time and Courtroom No. 5, 12th Floor, Postoffice Building, Boston Massachusetts as the place for public hearing where evidence should be taken and considered upon the said charges and upon the issues raised by the said

pleadings. This said notice and order was duly served upon the respondent. By order dated May 23, 1934 the Acting Secretary designated Arthur P. Curran, an officer and employee of the Department of Agriculture, as Presiding Officer to conduct said hearing.

The hearing was held at the time and place appointed. The Secretary of Agriculture was represented by Elmer D. Hays, Esq. of Washington, D. C. and Richard H. Field, Esq. of Boston, Massachusetts. Charles S. Walkup, Jr., Esq., counsel for the respondent, was present but did not care to be recorded as appearing for the respondent at the hearing.

At the opening of the hearing, however, counsel for the respondent made a statement in which he attached the validity of the license and the power of the Secretary to conduct the hearings with respect to charges raised by the pleadings. At the conclusion of Mr. Walkup's statement, counsel for the Secretary proceeded with the presentation of evidence in support of the charges contained in said Order to Show Cause. At said hearing the fullest opportunity to be heard and to produce evidence bearing upon the issue as presented was afforded to the Secretary and to the respondent and, although the respondent and his counsel were present in the courtroom throughout the proceedings, they declined to avail themselves of the opportunity to participate therein. The hearing consumed the entire day.

Thereupon the said Presiding Officer made proposed findings of fact and recommendations and reported the same to the Secretary together with the record of the proceedings, including the stenographic report of all of the testimony taken and evidence offered and received at said hearing with the exhibits offered and received in evidence at the said hearing attached thereto.

Upon the record as thus made, including the said Order to Show Cause, the respondent's answer, and the official report of proceedings covering all oral testimony and documentary evidence, the Secretary of Agriculture makes, in addition to those found above, the following specific finding of fact:

(a) That the respondent, E. M. Dwyer, resides at 324 Washington Street, Weymouth, Massachusetts, and is a distributor licensed by the town of Weymouth, Massachusetts to distribute milk in said town of Weymouth, which town is located in the "Greater Boston Market" as defined in the licenses under consideration, and he has continuously throughout the periods covered by License No. 15 and License No. 38 distributed, marketed or handled fluid milk for consumption in the Greater Boston Market.

(b) That continuously from November 3, 1933 to May 15, 1934 the respondent purchased and received and distributed, marketed and handled as a distributor in the Greater Boston Market large quantities of fluid milk shipped to him by Clyde Valley Cooperative Creamery Company from the State of Vermont.

(c) That the respondent has, since November 3, 1933, been engaged and is now engaged in distributing, marketing or handling fluid milk in interstate commerce, and also in intrastate commerce, in the Greater Boston Market and in distributing, marketing or handling said milk in competition with other distributors in the Greater Boston Market who were and are also distributing, marketing or handling fluid milk in the current of interstate commerce. The said interstate and intrastate operations of respondent with respect to fluid milk distributed in the Greater Boston Market are so inextricably intermingled as to place all of his distributive operations in the current of interstate commerce, and that portion of his operations which is interstate cannot be effectively regulated or licensed without regulating or licensing the whole of his said operations, including that portion thereof which is intrastate.

(d) The marketing of milk for distribution in the Greater Boston Market and the distribution thereof are entirely in the current of interstate commerce because the said marketing and distribution are partly interstate and partly intrastate commerce and so inextricably intermingled that the said interstate portion cannot be effectively regulated or licensed without licensing that portion which is intrastate commerce.

(e) That said E. M. Dwyer was a signatory of the Marketing Agreement for Milk -- Greater Boston Market, approved and executed by the Secretary on October 30, 1933, effective November 3, 1933.

(f) That said E. M. Dwyer was a signatory to an instrument dated November 3, 1933, entered into by certain contracting producers and certain contracting distributors, naming Frederick S. Snyder to act as director under said marketing agreement.

(g) That said designation of Frederick S. Snyder as director was approved by the Secretary.

(h) That the director mailed to distributors in the Greater Boston Market certain forms known as Form No. 13, requiring distributors to report to the director their purchases and sales of milk for the various accounting periods under License No. 15.

(i) That the respondent received and thereafter filed with the director, reports of his purchases and sales of milk with respect to the period November 3, 1933 to November 30, 1933, and for the period December 1, 1933 to December 15, 1933.

(j) That the respondent failed and refused to submit to the director reports of his purchases and sales of milk for the various accounting periods subsequent to the period December 1, 1933 to December 15, 1933.

(k) That for the period November 3, 1933 to November 30, 1933 and for the period December 1, 1933 to December 15, 1933

the payments to be made in accordance with the license to producers by the respondent were less than the total payments due by the respondent for Class I milk and Class II milk handled by the respondent; and on December 29, 1933 the respondent was notified of the amount of such difference (hereinafter referred to as equalization payment) for the period November 3 to November 30, 1933 and on January 6, 1934 the respondent was notified of the amount of such difference (hereinafter referred to as equalization payment) for the period December 1 to December 15, 1933.

(l) That, on December 29, 1933 a bill for equalization payment, amounting to \$221.61, due under the provisions of paragraph 5 (a) Section D of Exhibit D and Paragraph 2 of Article III of the License, marketing service charge, amounting to \$45.09, due under the provisions of Paragraph 6 of Article III of the License and distributor's share of administrative expenses, amount to \$5.48, due under the provisions of Paragraph 11 (d) of Article III of the Marketing Agreement, signed by the respondent, covering the period November 3, 1933 to November 30, 1933 was sent to the respondent.

(m) That on January 6, 1934 a bill for equalization payment, amounting to \$147.19, due under the provisions of Paragraph 5 (a), Section D of Exhibit D and Paragraph 2 of Article III of the License, marketing service charge, amounting to \$24.43, due under the provisions of Paragraph 6 of Article III of the License and distributor's share of administrative expenses, amount to \$3.01, due under the provisions of Paragraph 11 (d) of Article III of the Marketing Agreement, signed by the respondent, covering the period December 1, 1933 to December 15, 1933 was sent to the respondent.

(n) That the respondent has repeatedly been requested to pay the amounts due and owing by him to the director as above set forth, but has failed and refused to make payment of the same or any part thereof.

(o) That on March 23, 1934, pursuant to Paragraphs 8 and 9 of Part 2 of License No. 38, License for Milk - Greater Boston Market, the director sent the respondent a statement of his obligations under the terms of the prior License No. 15, with a formal demand for payment thereof, together with enclosed forms requiring respondent to furnish a complete and correct statement of his receipts of milk, sales of Class 1 milk and sales of Class 2 milk, and of all deductions from payments to producers in respect of such milk for the periods from November 3, 1933 to March 15, 1934, wherever the respondent had not previously made adequate reports.

(p) That the respondent, although he received aforementioned demand, dated March 23, 1934, failed and refused to furnish to the director a statement of his receipts of milk and sales of Class 1 milk, sales of Class 2 milk and of all deductions from payments to producers in respect of such milk for the periods subsequent to

December 15, 1933, as provided in Par. 9 of Part II of License No. 38, License for Milk - Greater Boston Market.

(q) That the respondent, although he received from the director on March 23, 1934, a statement of his obligations arising under License No. 15, failed and refused to discharge his obligations as set forth in the statement rendered to him, contrary to the provisions of Par. 8 of Part II of License No. 38, License for Milk - Greater Boston Market.

(r) That the respondent has continuously since March 16, 1934, distributed or marketed or handled, for ultimate consumption in the Greater Boston Market, fluid milk which, since the effective date of said License No. 38, was purchased by the respondent from producers who failed to authorize the respondent with respect to payments for milk purchased from said producers to comply with the provisions of Exhibit A of said License No. 38.

(s) That on March 16, 1934, the Secretary duly designated Einar Jensen as the Market Administrator under License No. 38, License for Milk -- Greater Boston Market, and continuously since said date the said Einar Jensen has functioned and performed his duties as Market Administrator in accordance with the provisions of said License.

(t) That the respondent has failed and refused to submit to the Market Administrator, duly designated under License No. 38, in the manner prescribed by the Market Administrator, the reports as provided for by Par. 3 of Sec. A of Exhibit A of said license.

(u) That the respondent has failed and refused to submit to the Market Administrator, duly designated under License No. 38, written reports verified under oath, as provided for by Par. 5 of Exhibit B of said license, which reports are required to be submitted within twenty days after the effective date of said license.

(v) That the respondent has failed and refused to make the deductions from the payments made to producers, as provided for by Par. 1 of Article II and Paragraphs 1 (a), 1 (b) and Paragraph 2 of Sec. D of Exhibit A of said License No. 38, and has failed and refused to pay to the Market Administrator the said deductions, as required by the aforesaid provisions.

(w) That the respondent, although engaged since the effective date of License No. 38, in distributing or marketing or handling in the current of interstate commerce for ultimate consumption in the Greater Boston Market, fluid milk purchased by said respondent from producers since the effective date of said license, has failed and refused to pay such producers for such milk, in accordance with the terms and conditions of Par. 1 of Article II of said license and Par. 5 of Sec. A of Exhibit A of said license.

CONCLUSION

Based upon the foregoing findings of fact, the Secretary of Agriculture hereby determines and concludes that the facts and circumstances proved in this cause establish and prove the truth of the charges numbered (1),(2),(3),(4),(5),(6),(7),(8),(9),(10),(11),(12),(13) and (14) of the Order to Show Cause and prove the failure of the respondent to fulfill all of his obligations which have arisen by virtue of or pursuant to License No. 15 and the violations by the respondent of License No. 38 as charged therein, and further, that any one of said violations so established and proved warrants independently the revocation of respondent's license.

The Secretary of Agriculture issued the following order:

IT IS HEREBY ORDERED that the license of E. M. Dwyer, granted under License No. 38, License for Milk--Greater Boston Market, be and it is hereby revoked.

IT IS FURTHER ORDERED that this order shall become effective on the 25th day of June, 1934.

IT IS FURTHER ORDERED that a copy of this order be served upon respondent by depositing same in the United States mail, registered and addressed to E. M. Dwyer, 324 Washington Street, Weymouth, Massachusetts.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the official seal of the Department of Agriculture to be affixed in the City of Washington this 25th day of June, 1934.

S/ H. A. Wallace

Secretary of Agriculture

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